MEMORANDUM

To: SCPD Policy & Law Committee

From: Brian Hartman

Re: Legislative & Regulatory Initiatives

Date: June 4, 2007

I am providing my analysis of sixteen (16) legislative and regulatory initiatives in anticipation of the June 14 meeting. Given time constraints, my commentary should be considered preliminary and non-exhaustive.

1. DSS Final Child Care Subsidy Regulation [10 DE Reg. 1826 (June 1, 2007)]

This is an information item.

The SCPD and GACEC commented on the proposed version of these regulations in April, 2007. The Councils recommended that DSS consider two (2) amendments to clarify that actions envisioned in the standards would be handled by case managers. The Division agreed and effected both amendments.

Since the regulations are final, and DSS adopted all recommendations, no further action is required.

2. DOE Final Health-Related Regulations [10 DE Reg. 1807 (June 1, 2007)]

The SCPD and GACEC commented on the proposed version of these regulations in April, 2007. I attach a copy of the GACEC's April 18, 2007 letter for facilitated reference. The Department has now adopted final regulations with several amendments prompted by the Councils' comments.

804 Immunizations

First, the Councils noted that some children with disabilities are eligible at birth. Therefore, the Councils recommended substituting "birth" for "two months" of age in the definition of "school enterer". The DOE agreed and effected the amendment to Section 1.0.

Second, the Councils recommended rewriting a 101 word, incomprehensible sentence in

Section 2.1. The DOE agreed and incorporated the concepts embodied in the sentence into three (3) subsections.

Third, the Councils recommended placing some citations in parentheses. The DOE effected no amendment.

Fourth, the Councils suggested an amendment to §4.0 to include a reference to "student". The DOE concurred and included the reference.

811 School Health Record Keeping

Fifth, the Councils recommended an amendment to Section 1.0 to clarify that the emergency treatment card cover "acute exacerbation of a health condition" rather than only sickness or injury. The DOE effected no amendment. Parenthetically, the DOE's commentary on this section does not match the text. The DOE comments that "the Emergency Card is about general school procedures and is not procedures for individual students". At 1808. This representation is belied by the text which contemplates individual information about students, including emergency contacts, physician, and "any medical conditions or allergies the student has". See also Section 2.1.

Sixth, the Councils recommended that the regulations identify who is authorized to determine who has access to the information in the emergency treatment card. The DOE edited §2.1.1 to clarify that the card should only "be shared on a need to know basis".

Seventh, the Councils recommended deletion of an extraneous hyphen in §5.1. The hyphen still appears in the text.

815 Physical Examinations and Screenings

Eighth, the Councils observed that §2.3.1.1. was phrased as a mandate to entities not subject to DOE regulation. The DOE amended the subsection.

Ninth, the Councils noted that §2.3.1.1 omitted a statutory exemption based on religious belief. The DOE added a new §2.3.1.2 to address the exemption.

Tenth, the Councils noted that the regulations ostensibly disallowed enrollment of older students without lead screening verification. The DOE amended §2.3 to clarify that the requirement only applies to school enterers at the pre-K or Kindergarten levels.

Eleventh, the Councils recommended deletion of an extraneous "the" in §2.3.2. The DOE deleted the word.

817 Administration of Medications & Treatments

Twelfth, the Councils strongly objected to a provision barring a nurse from administering a medication outside FDA recommendations. The Councils shared a Medicaid regulation with a broader authorization. The DOE incorporated the Medicaid language into §3.2.

Since the regulations are final, and the DOE adopted several amendments prompted by the Councils' comments, no further action is required. The Councils may wish to consider issuing a "thank-you" letter since the DOE was generally responsive to the Councils' concerns.

3. DOE Final Diploma Regulations [10 DE Reg. 1802 (June 1, 2007)]

The SCPD and GACEC commented on the proposed version of these regulations in April, 2007. I attach a copy of the GACEC's April 18 letter for facilitated reference. The DOE has now adopted final regulations with some amendments prompted by the Councils' comments.

First, the Councils noted that the proposed regulations literally provided only 5 days for comments. The DOE responded through a May 14 letter that this was an inadvertent error.

Second, the Councils recommended substituting "student's guidance counselor" for "their guidance counselor" in three sections for grammatical consistency. The DOE agreed and substituted "student's advisor" in the identified sections.

Third, although not earmarked for revision, the Councils recommended two (2) changes to the definition of "Support Services", i.e., substituting "educational" for "academic" and "extra year(s) of high school" for "a fifth year of high school". The DOE effected both amendments.

Fourth, the Councils noted that the relationship between an IEP and Student Success Plan ("SSP") was unclear. The DOE inserted the following sentence in §4.1: "For a student with an Individualized Education Program (IEP) the Student Success Plan (SSP) shall also incorporate the other aspects of the transition plan required by 14 Admin. Code 925".

Fifth, the Councils recommended strengthening the monitoring of student progress standard in §4.2.1. The DOE adopted the recommendation verbatim. The monitoring subsection now contemplates district adherence to the following criteria: "Actively monitoring student progress on an ongoing basis and, at a minimum, by the end of each marking period in those courses required for graduation."

Since the regulations are final, and the DOE adopted amendments consistent with each of the Councils' recommendations, a "thank-you" letter would be appropriate.

4. DOE Final Accountability Review Regulation [10 DE Reg. 1795 (June 1, 2007)]

The Department of Education adopted final regulations in May which revise the review

process for schools and districts challenging their "accountability" performance classification. The performance classifications range from "Academic Watch Under Improvement" to "Superior". See Section 6.0. The Department did not issue proposed regulations based on it view that the procedural standards were exempt under Title 29 Del.C. §10113(2).

The amendments are confined to Section 8.0. A school or district can apply for review within 15 days of notice of preliminary classification. Upon receipt, the Secretary refers the request for review to a designee who becomes the "point person" for the review. The assessment is conducted by a 3-person Review Advisory Committee appointed by the Secretary. The Committee issues a recommendation to the Secretary who makes a final decision within 30 days of receipt of the request for review.

I did not identify any significant concerns with the process. Moreover, the Department has not solicited comments on the regulations. My only recommendation is that the GACEC consider alerting the DOE to an ostensible discrepancy in Section 6.0. The preface to the regulation recites that there are "five levels of performance classification" while the regulation lists seven: 1) Superior; 2) Commendable; 3) Academic Review; 4) Academic Progress; 5) Academic Progress Under Improvement; 6) Academic Watch; and 7) Academic Watch Under Improvement. The DOE may wish to address this apparent discrepancy when the accountability regulation is prospectively revised.

5. DOE Final Special Education Regulations [10 DE Reg. 1816 (June 1, 2007)]

In January, 2007, the Department of Education shared pre-publication drafts of proposed special education regulations implementing new federal regulations adopted effective October 13, 2006. The GACEC submitted extensive commentary on the pre-publication drafts which covered Subparts A, C, D, E, F, G, and I and Discipline.. This resulted in many amendments to the drafts. The DOE then published proposed regulations in March, 2007 [10 DE Reg. 1365 (March 1, 2007)]. With the exception of discrete sections on ESY and eligibility of students with visual impairments and learning disabilities (Items 6 and 7 below), the Department has now adopted final regulations. The Department also forwarded a May 15, 2007 14-page memo (appended as an addendum to this memo) which lists the GACEC's comments on all subparts apart from D and the DOE's response. As it indicates, the Department agreed with the vast majority of suggestions and effected conforming amendments.

Given the DOE's concurrence with most of the GACEC's suggestions, I recommend that the GACEC issue a "thank-you" letter to the Department.

6. DOE Proposed ESY Regulations [10 DE Reg. 1758 (June 1, 2007)]

The Department of Education proposes to re-adopt extended school year ("ESY") regulations. The synopsis indicates that the Department inadvertently omitted the ESY standards when the balance of Regulation 923 was recently adopted.

I have the following observations.

First, the proposed standards are almost identical to those in the current AMSES. This is a favorable approach. The DLP and GACEC negotiated the current version with the DOE a decade ago. At that time, the Department was considering adoption of a simple regression/recoupment standard as the sole basis for determining ESY eligibility. The DOE and GACEC agreed to adopt standards guided by the results of a Maryland class action, Reusch v. Fountain, 872 F. Supp. 1421 (D. Md. 1994).

Second, the proposed regulation deletes one of the two "DOE notes" contained in the current regulation. The deleted note recites as follows:

> Extended school year services are special education and/or related services provided outside the standard schedule of school days (Title 14, Delaware Code, Section 1703), for the purpose of providing a free appropriate public education to a particular child, per his/her Individualized Education Program (IEP).

The DOE had agreed to incorporate this note after negotiation with the GACEC. Students with classifications of SMH, TMH, autism, deaf-blindness, TBI, or orthopedic disabilities are automatically entitled to more than the normal 180-day school year. See attached Title 14 Del.C. §1703(e)(f). Without the note, the regulations would eviscerate this statutory entitlement and subject such students to individual and inconsistent determinations of ESY eligibility under Section 6.5. Sections 6.4 and 6.5 literally allow services "beyond the normal school year of the public agency" (180 days) only if students meet the standards in Section 6.5. The DOE inserted the note in the former AMSES to clarify that ESY standards are based on supplementation of the "standard schedule of school days " as defined in Title 14 Del.C. §1703 (which includes the 222-day eligibility for students with classifications of SMH, TMH, autism, deaf-blindness, TBI, or orthopedic disabilities). The "note" is obviously very important and should be reinstated. Alternatively, Section 6.4 could be amended as follows:

> "Extended School Year Services" means special education and related services that are provided to a child with a disability beyond the standard schedule of school days (Title 14 Del.C. §1703) in accordance with the child's IEP, at no cost to the parents of the child, and consistent with DOE standards.

Third, the DOE may wish to consider embellishment of Section 6.7. As the attached February 11, 2002 DOE memo indicates, special education students may be required to attend summer school based on low DSTP scores. The DOE could consider amending the second sentence in Section 6.7 as follows:

> Normally scheduled summer school programs, *including remedial DSTP-related summer school programs offered pursuant to 14 DE Admin Code 100*, may be an option for providing extended school year services if such programs can meet the individual needs of each child, as identified in the child's IEP.

Fourth, the DOE previously compiled and analyzed data on ESY. See attached January 21, 1999 memo from Tom Pledgie, Ph.D. and October, 2000 NASDSE Analysis. The GACEC may wish to solicit updated information from the DOE in this context.

I recommend sharing the above observations with the DOE. Given its potential impact on students with certain disabilities, I also recommend that the comments be promptly shared with the ARC; Autism Society; Brain Injury Association; and Jack Jadach, principal of the Leach School.

7. DOE Proposed Special Education Eligibility Regulations [10 DE Reg. 1761 (June 1, 2007)]

The Department of Education recently adopted Regulation 925 which comprehensively addressed IDEA evaluation, eligibility, and IEP standards [10 DE Reg. 1816 (June 1, 2007)]. The GACEC had submitted 9 pages of comments on the pre-publication version of the regulations through a February 28 memo. The DOE reserved publication of some standards pending further review. The DOE is now issuing proposed regulations covering eligibility of students with learning disabilities and visual impairments.

I have the following observations.

First, districts will be allowed to "phase in" the new evaluation standards and currently-eligible students will not be automatically reassessed outside the normal 3 year schedule. See Sections 6.4 and 3.0. This merits endorsement.

Second, the GACEC previously characterized the visual impairment eligibility standards as too restrictive. Its February 28 memo recited as follows:

> In Section 300.306C(1), we question whether the criteria for visual impairment based on lack of acuity are unduly prescriptive and constrictive. Literally, a student with only one eye whose remaining eye is corrected to 20/65 would be categorically excluded from qualifying under the visual impairment category. Such a student would have limited depth perception and acuity. The federal regulation [§300.8(b)(13)] is ostensibly less onerous: "Visual impairment including blindness means an impairment in vision that, even with correction, adversely affects a child's educational performance."

Although the DOE has now included degenerative diseases which are expected to reduce vision in the future (Section 6.17.2), the overall standard is still manifestly stricter than the federal

criteria, i.e. an impairment in vision that, even with correction, adversely affects a child's educational performance". At a minimum, I recommend inserting ", condition, or impairment" after the word "disease" in Section 6.17.2. If a child experiences damage to the eye through trauma, which "seriously affects visual function directly, not perceptually", the child remains ineligible under the visual impairment category. The medical or physical etiology of the impairment should not be dispositive of eligibility.

Third, the "partially sighted" standard in Section 6.17.3 is stricter than that in Section 6.17.2. The latter section authorizes eligibility if there is "a disease of the eye or visual system that seriously affects visual function directly, not perceptually." This concept is absent from Section 6.17.3. Since Section 6.17.3 is already somewhat convoluted, and omits consideration of non-disease visual impairments, I recommend substituting the following new Section 6.17.3:

> A licensed opthalmologist or optometrist shall document that a child meets the eligibility criteria of Sections 6.17.1 or 6.17.2.

This is simpler and achieves consistency among the regulations.

Fourth, Section 7.2 discourages intelligence testing as part of an LD eligibility assessment. Such testing is essentially only authorized in 2 contexts: 1) to differentiate students with mental retardation; and 2) to identify remedial interventions. This undermines Section 9.1.3 which contemplates consideration of patterns of strengths and weaknesses in assessments of intellectual development (e.g. scatter on I.Q. subtests). The federal regulation [34 C.F.R. §300.309(a)(2)(ii)] specifically contemplates assessment of "intellectual development". Moreover, as the GACEC noted in its February memo, if a team does not know how "smart" a student is, how can it assess whether performance is depressed?

Fifth, in a related context, Section 8.1.4 makes a school psychologist optional in the context of LD assessment. The GACEC addressed this approach in its February 28 memo. Although this approach meets the minimum federal standard (34 C.F.R. §300.308), the better practice would be to require the involvement of a school psychologist to enhance the validity and reliability of the assessment.

Sixth, Section 9.1 focuses exclusively on an assessment of whether a student meets age and grade level standards. This is unduly constrictive. The GACEC's February 28 comment in this context remains apt:

> The committee recognizes that §300.309 borrows standards from federal §300.311(a)(5) establishing age and grade-level points of reference. Although such reference points may be useful, they should not be <u>exclusive</u>. "High I.Q." students who would be performing much better than "age" or "grade-level" expectations <u>but for</u> a clinical learning disability should still be candidates for LD classification. Students may be eligible "even though they are

> advancing from grade to grade" [federal §300.111(c )(1)]. See also OSEP Policy Letter to P. Lillie, 23 IDELR 714, 717 (April 5, 1995) [student's underachievement is measured against a student's potential] and OSEP Policy Letter from J. Schrag to S. Ullisi, 19 IDELR 633 (January 14, 1992) [In noting that high IQ students may qualify as LD, OSEP commented - "It is OSEP's position that each child who is evaluated for suspected learning disability must be measured against his or her own expected performance, and not against some arbitrary general standard."]. Cf. Conrad Weiser Area School District v. Thomas and Wendy L, 603 A.2d 701 (Pa. Cmwlth. 1992) [gifted student determined LD despite district's argument that child did not "need" special education]. At a minimum, it would be preferable to amend §300.309(a)(1) and §300.311(a)(5)(i ) to read "...child does not achieve adequately for the child's intelligence or age or meet State-approved grade-level standards...". Section 300.309(a)(2)(i) could likewise be amended to read "...progress commensurate with intelligence or does not meet age or State-approved grade-level standards...".

Consistent with the commentary, it would be preferable to amend Section 9.1.1 to read "...child does not achieve adequately for the child's intelligence or age or meet State-approved grade level standards...". Section 9.1.2 could likewise be amended to read "...progress commensurate with intelligence or does not meet age or State-approved grade-level standards...".

Seventh, Section 12.0 establishes a rather convoluted and tortured preferral intervention process which includes 24 school weeks (Section 12.8.5) prior to consideration of referral for a special education evaluation. In its February 28 memo, the GACEC commented as follows:

> In §300.301, the time period for an initial evaluation is too lengthy. Indeed, the overall regulatory scheme contemplates undue delay in the process between "Childfind" identification and development of an IEP. Proposed §300.312v authorizes an aggregate of 24 weeks (approximately 6 months) of pre-referral interventions. Parental consent would then be solicited and obtained (with no explicit timetable). Once consent is obtained, §300.301 allows up to 45 school days or 90 calendar days (whichever is less) to complete the initial assessment and convene the meeting to determine eligibility. Then, consistent with §300.323, another 30 days may pass before an initial IEP meeting is convened. An entire school year could easily elapse under this Kafkaesque scheme. The ad hoc committee strongly endorses a more expeditious system.

Although the regulatory numbering has changed, the above observation remains apt.

Eighth, in a related context, Section 12.11 allows a parent to initiate a request for special education evaluation and bypass the RTI process. The GACEC commented on the pre-publication version of this standard as follows:

> As discussed in Par. 4 above, §300.312 is part of an evaluation system which authorizes inordinate delay in special education assessment. Section 300.312(f) is particularly egregious. Consistent with the discussion in Par. 41 above, once a public agency suspects that a child may have a qualifying disability, it must provide notice to the parents of their right to initiate an IDEA evaluation. In contrast, §300.312(f) does not require affirmative notice to the parents and is based on the notion that parents will magically "know" that they can request an IDEA evaluation. Likewise, this section authorizes an exception to even such parental request by rerouting a child suspected of EMH or LD eligibility back to the prereferral system. This is not consistent with the federal scheme which contemplates timely initial evaluation. If a child has Downs Syndrome and an IQ in the 50s, making that student endure a 24 school week intervention experience to rule out EMH is ludicrous.

Although the regulatory numbering has changed, the above observation remains valid. Essentially, a district which has reason to believe that a child may be a child with a disability should solicit parental consent and initiate a special education evaluation. See 34 C.F.R. §§300.111, 300.300-300.302.

Ninth, although not earmarked for amendment, I note that Section 6.5.4.1 categorically ends a student's special education eligibility upon the student's 21st birthday. The former AMSES (§4.1.7) was less strict:

> Children in special education who attain age 21 after August 31 may continue their placement until the end of the school year, including appropriate summer services through August 31.

Indeed, the current Section 6.5.4.1 literally requires an abrupt cessation of services on a student's birthday irrespective of when it occurs during a school year. The DOE may wish to consider whether the former approach remains "allowable" and "preferable".

I recommend sharing the above observations with the DOE.

8. DMMA Proposed LTC Annuity Regulation [10 DE Reg. 1781 (June 1, 2007)]

The SCPD and GACEC commented on a previous version of these regulations in November, 2006 [10 DE Reg. 798 (November 1, 2007)]. Those regulations became final in April, 2007 [10 DE Reg. 1601 (April 1, 2007)]. DMMA is now issuing a proposed regulatory amendment based on "additional guidance received from the Centers for Medicare and Medicaid Services (CMS)".

The only proposed change is to amend one sentence as follows: "DMMA will require that the fair market value of the annuity income stream be ~~sold at Fair Market Value~~ counted as a resource." Although not a paragon of clarity, it appears that there would no longer be a requirement

that annuities be sold. Rather, the fair market value of the annuity income stream would be counted as a resource.

I could not locate any new CMS guidance in this context. I attach the CMS State Medicaid Director letter on annuities issued July 27, 2006. The guidance suggests that states should consider annuities as resources in determining eligibility. See Section I.D.

Since the amendment appears to favor consumers by no longer requiring outright sale of the annuity, and counting the annuity as a resource appears supported by CMS guidance, I recommend that the SCPD endorse the concept of the regulation.

9. DMMA Prop. Pediatric Nursing Facility Reimbursement Reg. [10 DE Reg. 1780 (June 1, 2007)]

The Division of Medicaid & Medical Assistance proposes to establish Medicaid reimbursement standards for pediatric nursing facilities.

As background, I attach January 6, 2002 and November 11, 2005 News Journal articles. As the articles indicate, there were major problems with adequacy of care in a pediatric nursing home in 1988-1999. The DLTCRP issued comprehensive pediatric nursing home standards in 2002. See 6 DE Reg. 79 (July 1, 2002). The 2002 article indicates that low reimbursement rates deter facilities from accepting children. It quotes Yrene Waldron of the Delaware Health Care Facilities Association as follows:

> "I know of no facility that's going to accept pediatric patients," she said. "The reimbursement for these types of clients is not commensurate with the cost of providing care." Waldron said the new regulations make sense, but could make it even less likely that a nursing home would get into the business of long-term care for children. In part, that's because the rules call for staff with specialties that are hard to find in Delaware, Waldron said.

I have the following observations.

First, the Council may wish to note its strong preference for keeping children out of nursing homes if adequate care is available in community-based settings. The "Summary of Proposal" indicates that nursing home placement is not contemplated for children who qualify for PPEC services. The Council may also wish to confirm its view that the availability of pediatric nursing home care not be considered preferable to other day programs such as the First State School.

Second, the rate adjustment standards are rather anemic. Rates for each level of care are computed "for a base year and may be inflated each year thereafter using a nationally recognized inflation index". Use of an appropriate index merits endorsements since it is simple and does not require extensive assessment. However, there is no requirement of reassessment of rates nor any

indication that annual reassessment will be a norm. In other contexts, DMMA has required rebasing at least every three (3) years. See attached 6 DE Reg. 885, 886 (January 1, 2003)[inpatient hospital care]. Providers often complain that the State establishes a base rate and then continues to reimburse based on that rate for several years without adjustment. It would be preferable to amend the regulation with the following italicized sentence:

Rates for each level of care shall be computed for a base year and may be inflated each year thereafter using a nationally recognized inflation index. *At a minimum, such rebasing shall occur at least every three years.*

Third, for similar reasons, it would be preferable to establish 2007 as the base year. As written, the State could adopt a 2005 base year which would artificially depress the reimbursement rate.

Fourth, the "special case" authorization in the last paragraph of the regulation merits endorsement. Medically involved children are not "fungible" and may require individualized consideration beyond an assessment of skilled or super-skilled services eligibility.

I recommend sharing the above observations with DMMA, the Nursing Home Quality Assurance Commission, Senators Marshall and Blevins, and Rep. Maier.

10. DSS Proposed Food Stamp Verification Regulations [10 DE Reg. 1783 (June 1, 2007)]

The Division of Social Services proposes to revise its verification standards in the context of income and deductions.

The rationale for the amendment is the prevalence of errors involving income and shelter/utility costs due to lack of client reporting at recertification. The standards are more prescriptive. Verification [defined as use of third party information or documentation to establish the accuracy of statements on the application (§9031)] that a household has a utility expense (but not the actual amount) will be required [§9032.3]. Verification of shelter costs will be required upon initial application, recertification, and when shelter expenses materially change [§9032.0]. While the current regulation exempted verification of changes of income of less than $50, the proposed regulation requires verification of all changes in income [§9038B].

I did not identify any inconsistencies or significant concerns with the proposed regulations. They are more "demanding" in the context of verification which DSS justifies based on prevalence of errors. I recommend no action. Alternatively, the Council could note that it reviewed the regulation, would have preferred retention of the current standard exempting verification of income if the amount changed by less than $50, and otherwise identified no significant concerns with the standards based on the State's desire to reduce error rates.

11. H.B. No. 173 (DUI Sentencing)

This bill was introduced on May 16, 2007. As of June 4, it remained in the House Public

Safety & Homeland Security Committee. As the synopsis indicates, the bill has the following principal effects: 1) increasing DUI fines; 2) increasing authorized sentences for repeat offenders; and 3) requiring use of alcohol monitoring devices for 4th and higher offenses with authorization for court to impose them for lower offenses.

I have the following observations.

First, DUI is a source of disability for both drivers, passengers, and pedestrians. Therefore, the SCPD has previously endorsed deterrent legislation, including the lowering of the DUI limit from 0.10 to 0.08. However, the Council has also promoted judgment and restraint in punishment of persons with drug/alcohol addiction.

Second, the sponsors indicate that fines have not been increased "in a number of years". With some limited exceptions, the bill would have the following effect on fines:

| Offense | Current §4177(d) [effective 7/1/07] | H.B. No. 173 |
|---|---|---|
| First | $230-$1150 | $300-$1500 |
| Second | $575-$2300 | $800-$3000 |
| Third | $1000-$3000 | $1500-$3000 |
| Fourth | $2000-$6000 | $2500-$7500 |
| Fifth | $2000-$6000 | $3500-$10000 |
| Sixth | $2000-$6000 | $5000-$10000 |
| Seventh | $2000-$6000 | $10000-$15000 |

In addition to the fines, covered offenders would be required to pay for the cost of alcohol monitoring devices and/or electronic monitors (lines 65-67). As a practical matter, the "high end" fines may be difficult to pay. Offenders generally lose their license [Title 21 Del.C. §4177A] for periods ranging from 1 year (1st offense) to 5 years (4th offense) subject to application for a conditional license if certain conditions are met [Title 21 Del.C. §4177C]. Moreover, under the bill, periods of imprisonment range from 6 months (optional for 1st offense) to 10-15 years (mandatory for 7th offense). Individuals subject to loss of their license and lengthy incarceration will have attenuated financial ability to pay huge fines. The anomaly is that offenders with the least ability to pay due to lengthy jail sentences are required to pay the largest fines. The Legislature may wish to consider more moderate increases.

Third, the current statute [§4177(d)(5)] authorizes the Attorney General to move the sentencing court to apply "third offense" sentencing standards to persons charged with 4th or

subsequent offenses. This provides for the exercise of professional discretion by the prosecutor based on extenuating circumstances. For example, a person with an alcohol addiction with no prior record could have 4 separate DUI arrests within 4 days. Under these circumstances, the prosecutor could recommend incarceration of 1-2 years rather than 2-5 years. This statutory authorization is deleted by H.B. No. 173. The Legislature may wish to consider reinstatement of some variation of the authorization.

Fourth, the bill makes all sentences of imprisonment "minimum sentences" (line 25). This is ostensibly stricter than the current statute [§4177(d)(3)(4)]. There is also some tension between adopting an approach requiring judges to impose at least certain minimum sentences and House passage of H.B. No. 71 on April 3. The latter bill repeals mandatory minimum sentences relating to drug convictions and "returning to our State's outstanding judiciary the discretion to pronounce sentences appropriate to the cases and individuals before them."

Finally, in a related context, the Legislature may wish to consider the increased incarceration rates that may result from H.B. No. 173. Under current law the maximum sentence is 5 years [§4177(d)(4)] which is tripled to 15 years (lines 23-24) by this bill. There is no fiscal note with this bill to address potential increased costs to the Department of Correction.

I recommend sharing the above observations with policymakers. A copy should also be shared with the Public Defender and ACLU.

12. S.B. No. 112 (Public Health Emergencies)

This bill was introduced on May 17, 2007 and remained in the Senate Health & Social Services Committee as of June 4, 2007.

The bill would amend the attached Title 20 Del.C. §3133 by authorizing the "public health authority" [defined in §3132(10)] to direct the delivery of pre-packaged medical prescriptions and supplies during an emergency. Such delivery could be effected by licensed healthcare professionals and unlicensed persons who have completed in-service training by the Board of Pharmacy acting at the direction of the Public Health Authority irrespective of health care licensing restrictions. Recipients of such delivery would be limited to "essential workers" [defined at lines 10-14] and their families [line 22]. Essential workers and family members would be pre-screened annually for contraindications to medications [lines 27-28].

All in all, the concept underlying the legislation appears sound. During an emergency, first responders and other "essential workers" would benefit from authority to distribute medications and supplies without fear of violating licensing standards. My only recommendation would be to expand the scope of recipients of medical supplies and prescriptions. For example, the bill could be amended to authorize the Public Health Authority to expand the scope of recipients based on a determination of compelling need or exigent circumstances. This could be achieved by adding a Subsection (e) as follows:

(e) The Public Health Authority is authorized to expand the scope of recipients beyond essential

workers and their families based on a determination of compelling need or exigent circumstances. In exercising this option, the Public Health Authority may limit delivery to certain medications and medical supplies.

I recommend sharing the above observations with policymakers.

13. H.B. No. 167 (Hospital & LTC Facility Policies)

This bill was introduced on May 10, 2007. As of June 4, it remained in the House Health & Human Development Committee. The bill has two (2) purposes: 1) requiring hospitals and licensed long-term care facilities to allow adult patients to receive visitors subject to certain restrictions; and 2) requiring such facilities to honor powers of attorney, advance health care directives, and similar documents. The bill is problematic for several reasons, some of which are reflected in the attached April 18 letter from CLASI's poverty law program. As a supplement to that letter, I have the following observations.

First, the "need" for a hospital visitation statute is tenuous. As the April 18 letter indicates, JCAHO standards require any hospital visitation restriction to be determined with the patient's participation, evaluated for therapeutic effectiveness, and justified through documentation in the medical record. DHSS is also authorized to issue regulations covering hospitals, undermining the need for a statutory standard. See Title 16 Del.C. §1007.

Second, in the context of mental hospitals [Title 16 Del.C. §§5001(4) and 5101(2)], the bill creates a conflict with the existing bill of rights and actually authorizes hospital visitation restrictions based on less justification. The bill of rights only allows visitation restrictions based on avoidance of "serious harassment of others" and ""treatment team limitation based on a clinical determination of serious patient harm". See Title 16 Del.C. §5161(b)(9). In contrast, the bill authorizes restrictions based on more "flimsy" justification, including a general reference to "patient's medical condition" and "visitation hours". Indeed, the bill would affirmatively empower hospitals to adopt restrictive visitation hours (e.g. 1-2 hours daily) since it lacks any requirement of reasonable visitation hours and simply authorizes restrictions based on a hospital's visitation hours.

Third, the bill is more restrictive than existing law in the context of visitation within long-term care facilities. As the April 18 letter indicates, the LTC bill of rights creates a broad visitation right which recites as follows: "Every patient and resident may associate and communicate privately and without restriction with persons and groups of the patient's or resident's own choice (on the patient's or resident's own or their initiative) at any reasonable hour." Title 16 Del.C. §1121(11). The bill undercuts this liberal standard by affirmatively authorizing facilities to curb visitation based on amorphous "patient's medical condition" and truncated visitation hours. The bill could seriously limit visitation in long-term care facilities throughout the state, including nursing homes, assisted living residences, and group homes.

Fourth, as the April 18 letter indicates, the bill requires covered facilities to honor powers of

attorney, advance health care directives, and similar documents in accordance with the advance health care decisions law (Title 16 Del.C. Ch. 25) and POA statute (Title 12 Del.C. Ch. 49). Existing law already requires compliance:

> (d) Except as provided in subsections (e) and (f) of this section, a health-care provider or institution providing care to a patient shall:
>
> > (1) Comply with an individual instruction of the patient and with a reasonable interpretation of that instruction made by a person then authorized to make health-care decisions for the patient; and
> >
> > (2) In the absence of an individual instruction, comply with a health-care decision for the patient made by a person then authorized to make health-care decisions for the patient to the extent the agent or surrogate is permitted by this chapter.

Title 16 Del.C. §2508.

The only exception is based on the provider's written policy based on conscience. For example, St. Francis Hospital could decline an advance directive authorizing an abortion.

Therefore, at best, the bill "muddies the waters" by requiring facilities to honor directives when such a mandate is already in the Code. At worst, if the bill seeks to undermine the "conscience" exception, it is ill conceived.

I recommend strong opposition to the legislation. Commentary should be shared with the Mental Health Association, NAMI, the ARC, the ACLU, and AARP.

14. S.B. No. 90 (Sex Offender Management Board)

This bill was introduced on May 2, 2007. It was reported out of committee on May 10. As of June 4, 2007, it awaited action by the Senate. There is no fiscal note.

The bill would establish the Sex Offender Management Board. The Board would be chaired by the Secretary of the Department of Safety and Homeland Security (line 86) and include 20 other members from a variety of agencies and disciplines (lines 49-84). By January 1, 2009, the Board would "prescribe a standardized procedure for the evaluation, identification, and classification of adult and juvenile sex offenders" (lines 104-105); "approve the risk assessment screening instrument" (lines123-124); and "develop guidelines and standards for a system of programs and treatment of sex offenders" (lines 113-115). By January 1, 2010, the Board would "implement" guidelines on "monitoring and tracking, evaluation, identification, classification, and treatment" of sex offenders (lines 134-138); and 2) "adopt guidelines ...regarding the living arrangements and location of sex offenders" (lines 147-149). Effective with offenses committed after January 1, 2010, treatment would generally be required as part of sentencing for offenders (lines 159-162).

I have the following observations.

First, the definition of "sex offender" (line 42) could be improved. It includes a reference to persons who have been "convicted or adjudicated of an offense". It is unclear if this is intended to cover juvenile delinquency adjudications. Moreover, the term "adjudicated of an offense" is odd. Someone could be adjudicated not guilty of an offense. It would be preferable to refer to "convicted or adjudicated delinquent of an offense..." Compare Title 11 Del.C. §4121(a)(4)b.

Second, the bill (lines 108-109) unnecessarily restricts the professional discretion of the Board. It recites as follows:

> The Board shall develop and implement measures of success based on a no-cure policy for intervention.

Although "some sex offenders are extremely habituated" (line 107) and not subject to "cure", this is not true of all persons who have ever been found guilty of a sexual offense. For some offenders, the sex offense may have been a minor, isolated act and may be remote in time. For example, a 16 year old could have been adjudicated delinquent for indecent exposure for "flashing" or "mooning" and therefore be a sex offender within the scope of the bill. See line 43 and Title 11 Del.C. §761(g) and 764. It is counterproductive to statutorily direct the Board to conclusively treat all sex offenders as incorrigible, lifelong predators and to develop all policies based on that belief.

Third, the bill adopts a "one-size-fits-all" approach to screening. The Board is directed to "approve the risk assessment screening instrument" (lines 123-124). No single instrument will be appropriate for juveniles and adults, males and females, English-speaking and LEP persons, and persons of normal versus limited intellect.

Subject to the above observations and concerns, I recommend endorsement of the concept of the bill which would promote comprehensive assessment, review, and development of sex offender policies and interventions.

15. H.B. No. 178 (Hearing Aid Loan Bank)

This bill was introduced on May 17,2007. As of June 4, it remained in the House Health & Human Development Committee.

As background, the Legislature established a hearing aid loan program through H.B. No. 262 enacted in 2003. That bill contained a sunset provision which caused the program to lapse in December, 2006. This is an important Division of Public Health program which provides free hearing aids to children under age 3 who otherwise lack ready access to the device through Medicaid, CHIP, or private insurance. The SCPD, DDC, and GACEC provided input on the DPH regulations for the program which resulted in adoption of relatively consumer-oriented standards. See 7 DE Reg. 1758 (June 1, 2004).

The current bill would reestablish the program retroactive to December, 2006. Eligibility

and other standards are essentially the same as those created by H.B. No. 262 and currently codified at Title 16 Del.C. Ch. 26A. There was no fiscal note in H.B. No. 262 and no fiscal note in the current H.B. No. 178.

I recommend strong endorsement. The ability to hear has a significant impact on development of both receptive and expressive language at a critical stage in a child's life. Parenthetically, consistent with the attachments, a number of states have adopted laws requiring insurers to cover hearing aids. It would be useful for the Council(s) to recommend, based on the attachments, that Delaware consider similar legislation. A copy of the correspondence should be shared with the Insurance Commissioner, CODE, and the Delaware chapter of the Hearing Loss Association of Delaware (HLADE).

16. S.B. No. 94 (Nursing Home Administrators)

In May, 2007, I presented a critique of almost identical legislation, S.B. No. 88. The P&L Committee endorsed the critique. However, S.B. No. 88 was stricken on May 9 and SCPD submission of commentary on the bill was deferred. S.B. No. 94 was introduced on May 3. It was reported out of committee on May 16. S.B. No. 94 is identical to S.B. No. 88 with the exception of deletion of the 2/3 vote reference which appeared in the heading of the predecessor bill.

Since the balance of the bill is the same, I am submitting the same analysis (modified in bold) to refer to the new bill:

This lengthy (16-page) bill was introduced on May **3**, 2007. It remained in the Senate Sunset Committee as of May 7.

As background, the SCPD and GACEC commented on a similar bill, H.B. No. 72, in May, 2005. I attach a copy of the GACEC's May 3, 2005 correspondence. The Council's comments ostensibly prompted the attached H.A. No. 1 to H.B. No. 72.

The new legislation, S.B. No. **94**, is similar to H.B. No. 72 as amended. While it represents an improvement over the predecessor bill, I still have the following observations.

First, the bill requires small facilities which are not nursing homes to have a "nursing home administrator" (lines 25-30, 452-454). This may be unnecessary. For example, current DLTCRP regulations for Rest (Residential) Homes (16 Admin Code Part 3230) provide as follows:

> 1.0 Definition
>
> "Rest (Residential) Home" is an institution that provides resident beds and personal care services for persons who are normally able to manage activities of daily living. The home should provide friendly understanding to persons living there as well as appropriate care in order that residents' self-esteem, self-image, and role as a contributing member of the community may be reinforced.
> 7.1.1. ...Supervision by a licensed Nursing Home Administrator is not required for facilities with 4-8 beds inclusive. ...

In contrast, the bill requires a Nursing Home Administrator for each home with more than 4 persons. Colloquially speaking, this may be "overkill". The sponsors may wish to raise the threshold for requiring a Nursing Home Administrator from "more than 4 persons".

Second, proposed Section 5216 literally authorizes discipline for having a physical condition or disability:

> A practitioner licensed under this Chapter shall be subject to disciplinary actions set forth in §5218 of this Chapter, if, after hearing, the Board finds that the nursing home administrator:
>
> > ...(9) has a physical condition such that the performance of nursing home administration is or may be injurious or prejudicial to the public.

Disciplining a licensee for having a physical condition violates the Americans with Disabilities Act and Section 504 of the Rehabilitation Act. Even if a physical condition causes some limitation on ability to perform as a nursing home administrator, this is insufficient grounds to justify discipline.

Third, the bill runs afoul of the ADA and Section 504 in the context of use of prescriptions:

> A practitioner licensed under this Chapter shall be subject to disciplinary actions set forth in §5218 of this Chapter, if, after hearing, the Board finds that the nursing home administrator:
>
> ...(4) has excessively used or abused drugs either in the past two years or currently.

This provision likewise violates the ADA and Section 504 of the Rehabilitation Act. As the GACEC noted in its May 3, 2005 letter, this provision literally means that a licensee who had lots of prescriptions (e.g. prescription skin creams) two years ago is subject to discipline. The drugs may be perfectly legal, non-narcotic, over the counter or prescribed, and still subject the licensee to discipline if subjectively deemed "excessive". Indeed, there is an age discrimination component to this provision. Consistent with the attached table, persons aged 65+ average almost 10 prescriptions per year which could be construed as "excessive" based on "average" usage among the general public

Fourth, there are a few minor grammatical errors, i.e., the word "non-administrator" should be plural in line 54 and the word "therefore" should be "thereof" in line 358.

I recommend sharing the above observations with policymakers.

Attachments

ADDENDUM
(ITEM #5: DOE RESPONSE TO GACEC COMMENTS)

May 15, 2007

**MEMORANDUM**

TO: GACEC AMSES AD-HOC Committee

FROM: Martha Toomey, Director, Exceptional Children/Early Childhood Group, DOE

RE: Proposed AMSES Revisions

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The Department appreciates the Committee's extraordinary time and effort in reviewing the initial, informal drafts of revisions to the State's special education regulations. We have embedded our responses to the comments in red italics below.

Please note that before formal publication, the DOE revised the informal drafts to respond to the Committee's comments, feedback from other stakeholders and the Department's own ongoing review. We have not attempted to identify each change made to the informal draft before official publication. However, our responses below do identify several key changes between the informal draft and the published, proposed regulations.

As we previously noted, the published regulations use the State regulatory numbering system. Our responses below refer to the State numbering systems to help the Committee and Council more easily locate the sections on which it informally commented.

## SUBPART A - GENERAL

1. In §300.2(B)(1)(iii), "for" should be replaced with "of" in the Department of Services for Children, Youth and their Families. *The DOE has revised proposed 922.2.2.3 to incorporate the Committee's recommendations. The DOE has also added a definition of "these regulations"; added language cross referencing eligibility requirements in Subpart C to the definition of "child with a disability" and added a rule of construction about "multiple disabilities"; streamlined the definition of "highly qualified special education teachers"; and deleted as unnecessary definitions of "IFSP" and "Infant or Toddler with a disability."*

**SUBPART C - LOCAL EDUCATIONAL AGENCY ELIGIBILITY**

1. In §300.202(b)(ii), the DOE could include a comment or note observing that State funds are available for non-disabled children aged 5 through 20 years inclusive pursuant to Title 14 Del.C. §202. *The current rendering of the proposed regulations are for publication in the Register of Regulations and ultimately, the State's Administrative Code. The DOE believes that for those purposes, content should be limited to regulatory material. The DOE plans to reproduce the revised regulations in a new administrative manual (along with other supporting materials), and welcomes additional feedback about the manual's contents, etc., including any notes or commentary the Council would recommend.*

2. In §300.203(b)(3), there are two references to "SEA" that should be converted to "DOE". *All references to "SEA" have been converted to "DOE" in Subpart C as suggested by the Committee.*

3. In §300.204(e), the term "SEA" should be "DOE". *All references to "SEA" have been converted to "DOE" in Subpart C as suggested by the Committee.*

4. In §300.205(c), substitute "these regulations" for "this part". This is the approach adopted to references to "this part" in §§300.202(b)(ii), 300.209(c)(d), and 300.600(a). *All references to "this part" have been converted to "these regulations" in Subpart C as suggested by the Committee. In addition, a definition of "these regulations" has been added to Subpart A.*

5. In §300.209(c), after the word "school", the following words are omitted: "is an LEA, consistent with §300.28, that receives funding under". *924.9.3 has been corrected consistent with the Committee's suggestion.*

6. In §300.211, consider the following amendment: "LEAs must provide the DOE, *consistent with a format and timetable acceptable to the DOE,* with information necessary ..." This clarification may help with districts which are disinclined to submit data in a useful format. The DOE has included "format and timetable" references in similar contexts. Compare §§300.602(b)(2) and 300.645(b). Compare also 14 DE Admin Code 502, §8.0 and 14 DE Admin Code 900, §6.0. *The DOE has revised proposed 924.11.1 to incorporate the Committee's recommendations.*

7. Section 300.220(c) could be construed as limiting the authority of the DOE to disseminate or enforce special education regulations which are grounded in best practices or some basis apart from a court decision or change in statute. In similar contexts, the DOE has included a "reservation of right" provision. See, e.g., §§300.600(e) and 300.608(b). The DOE may wish to consider the following options. First, it could include the following introductory clause: "*Without limiting its general administrative and regulatory authority pursuant to Title 14 Del.C. §§102 and 3110,* the DOE may require an LEA..." Alternatively, it could include a Par. (d) similar to §300.226(d) to read as follows:

   *(d)* ***Construction****. Nothing in this section shall be construed to limit the general administrative and regulatory authority of the DOE under Title 14 Del.C. §§103 and*

*3110.*

Alternatively, it could include a broader caveat based on §300.600(e). *The DOE has added a new proposed subsection 924.20.4 to effectuate the Committee's recommendations.*

8. In §300.224(a)(1), there is an unnecessary period (.) after the symbols "§§". *The extraneous punctuation has been deleted.*

9. In §300.226(d), consider the following amendment: "Each LEA...the DOE, *consistent with a format and timetable acceptable to the DOE*, on... ". This clarification may help with districts which are disinclined to submit data in a useful format. *The DOE has revised proposed 924.26.5 to incorporate the Committee's recommendations.*

10. In §300.227, consider the following amendments:

    a. Substitute "DOE" for "SEA" in title.
    b. In §300.227(a)(1), substitute "The DOE shall" for "An SEA must" and substitute "DOE" for "SEA" in the later text.
    c. In §300.227(a)(1)(ii), delete the "t" in "regulationst".
    d. In §300.227(a)(2), amend the title to read as follows: "*DOE administrative procedures."*
    e. In §300.227(a)(2)(I) and (ii), substitute "DOE" for "SEA".
    f. In §300.227(b), substitute "DOE" for "SEA" and substitute "these regulations" for "this part". This is the approach adopted to references to "this part" in §§300.202(b)(ii) and 300.209(c)(d).

    *The DOE has revised proposed 924.27.0 to incorporate the Committee's recommendations.*

11. In §300.228, substitute "these regulations" for "this part". This is the approach adopted to references to "this part" in §§300.202(b)(ii) and 300.209(c)(d). *The DOE has revised proposed 924.28.0 to incorporate the Committee's recommendations.*

12. In §300.229, renumber (c) as (b). *The DOE has realigned all federal lettering and numbering, including the subsections noted, consistent with the numbering system required for State regulations.*

13. In §300.229(a), it would be preferable to substitute "a discipline record" for "discipline records" for consistency with the reference in the following subpart and for consistency with 14 DE Admin Code 252, §1.0. *The DOE has revised proposed 924.29.0 to incorporate the Committee's recommendations.*

14. In §300.229, we believe the references to "14 DE Admin Code §252" should read "14 DE Admin Code 252" (omitting the § symbol). *The section symbol has been deleted.*

**SUBPART E - PROCEDURAL SAFEGUARDS**

1. The DOE may wish to add a subsection to §300.501 to incorporate Title 14 Del.C. §3131

Minutes of Meetings. *The DOE has added a new subsection 926.1.5 to implement the Committee's recommendations.*

2. In §300.501(a)(3) there appears to be a word missing in the sentence that begins "Parents shall the right…". The sentence should read, "Parents shall have the right…" . *The Department has corrected proposed 926.1.2.2 to correct the text as noted by the Committee.*

3. In §300.501(b)(4), the GACEC would encourage the DOE to change "attempt" to "attempts". DOE should flesh out efforts and options to facilitate parent participation which could include multiple attempts utilizing multiple methods, such as written correspondence, phone calls or e-mail. *Because the proposed text of 926.1.4.3 is the same as the federal regulation and the preceding subsection 926.1.4.2 already provides some examples of methods to ensure parental participation, the Department does not believe that it is necessary to further regulate around this requirement.*

4. Under a literal reading of §300.502(d), a single hearing officer in a panel could authoritatively request an independent evaluation. The DOE may wish to clarify that a panel or a hearing officer appointed pursuant to §300.532 (expedited hearing) can authoritatively request an independent evaluation. *The Department has revised proposed 926.2.8 to incorporate the Committee's suggestion.*

5. The federal regulations contemplate that "reasonable" notice need not be uniform. See 71 Fed Reg. 46691 (August 14, 2006). However, the Ad Hoc Committee supports the 3-business-day standard in §300.503(a)(3) whereby public agencies must provide written notification no less than 3 business days prior to changing the child's placement. *We thank the Committee for its support. This provision now appears in the published regulations at 926.3.1.3.*

6. Section 300.504 could be improved by adding a subpart requiring at least the offer of procedural safeguards at each IEP meeting. *The Department has added a new proposed subsection 926.4.1.5 to incorporate the Committee's suggestion.*

7. Section 300.504(c) could be improved by explicitly requiring the notice to include the sample forms contemplated by §300.509. *The Department anticipates that it will require each LEA to use a State-produced "Notice of Procedural Safeguards," and that the State's Notice of Procedural Safeguards will include the forms the Committee mentions. Accordingly, the Department has not revised the text of the regulation itself to explicitly require that the forms be included in the Notice.*

8. In §300.506(b), the "and" at the end of "(iii)" should be placed at the end of "(iv)". *The Department has revised and reordered proposed 926.6.2 and welcomes additional comments from the Council or Committee about the revised section.*

9. The DOE may wish to consider whether some of the timeframes in §300.508 should be shortened in the context of expedited hearings covered by §300.532. For example, perhaps the 15-day standard in §300.508(d) and 10-day standard in §300.508(f) should be shortened.

Other time periods have been shortened. See, e.g., §§300.532(b)(4)(5). *Given the very small number of expedited hearings requested in Delaware, and the relative newness of the "pleading" style requirements in this section, the Department believes it is preferable to leave the time frames in 926.11.0 as originally proposed.*

10. In §300.511(g), the term "and persuasion" must be inserted after the work "proof" to comport with Title 14 Del.C. §3140. *The Department has revised proposed 926.2.8 to incorporate the Committee's suggestion in 926.11.10. Please note that the Department has also added language to 11.4.2 and 11.4.3 in recognition of Delaware's hearing panel system and the collective knowledge and skills of its members.*

11. The Ad Hoc Committee would like the DOE to implement their good intentions as outlined in Section 300.513(d)(2) to align with Federal 34 C.F.R. §300.513(d) and implement the publication of its findings and decisions, not only to the GACEC, but to the general public as stated. The DOE planned to publish all the decisions on its Website some years ago but this has not yet been implemented. *The Department agrees, and has added a sentence to proposed 926.13.6 to implement the Committee's request.*

12. In §300.515 (b), the extra period should be removed at the end of the sentence that ends with "…post-hearing argument." §300.515(d) should actually be (c). In §300.515(c), delete "and other review". This phrase is only material in states with a 2-tier due process system (district hearing and SEA review). *The Department has revised proposed 926.15.0 to incorporate the Committee's observations and suggestions.*

13. It would be preferable to include "Title 14 Del.C. §3142" to the "Authority" section at the end of §300.516. *The Department has inserted the additional citation to the authority note at the end of 926.16.0.*

14. Section 300.519(b) is underinclusive. Consistent with 34 C.F.R. §300.519, it would be preferable to address the propriety of foster parents serving as surrogate parents. *Foster parents may and do serve as surrogate parents if trained. The Department believes it is in the best interest of a vulnerable population to ensure that the only avenue for becoming a surrogate is through training.*

15. Section 300.519(h) authorizes the DOE to unilaterally terminate the appointment of a surrogate parent. This could be problematic in conflict of interest situations. For example, the surrogate parent may request a hearing requesting a private placement in which the DOE would be an adverse party given its potential 70% funding liability. There would be nothing in the regulations to preclude the DOE from terminating the surrogate and appointing a more "docile" representative. The former model, which required Family Court appointment, was a more insulated system which protected the integrity of the surrogate. There were cases in the past in which the surrogate challenged his proposed termination, resulting in hearings. At a minimum, the DOE should amend §300.520(h)(2) to limit its discretion to terminate a surrogate's appointment. Literally, no "cause" is needed under the current regulation. It would also be preferable to provide some due process to allow a challenge of the decision. *The Department has revised 926.19.11.2 to address some of the Committee's concerns, and*

*welcomes additional feedback and comments on the revision.*

16. Section 300.520(b) ostensibly misinterprets federal law. See the Act, Section 615(m)(1)(D); 34 C.F.R. §520(a); and comment at 71 Fed Reg. 46713 (August 14, 2006). The federal authorization only allows transfer of rights to the incarcerated student who has reached the age of majority. In contrast, the proposed DOE regulation allows transfer of rights to children under the age of majority incarcerated in an adult facility. *The Department agrees, and has corrected 926. 20.0 to incorporate the Committee's observation.*

**SUBPART F - MONITORING, ENFORCEMENT, CONFIDENTIALITY, AND PROGRAM INFORMATION**

*Please note that the DOE also renamed 927.2.0 and reordered its subparts, to improve readability, and deleted certain subsections not required by federal regulations.*

1. Section 300.605(a) limits the ability of LEAs to request a formal hearing to instances in which the DOE proposes to withhold Part B funds. The DOE may wish to consider whether this is too narrow. For example, should LEAs have the right to request a hearing to contest recovery of funds [§300.604(b)(v)]; or to contest the terms of a proposed compliance agreement [§300.604(b)(2)(I)]? *The DOE agrees, and has revised proposed 927.4.2.2.2 , 927.4.2.2.4 and 927.4.3.1 to incorporate the Committee's recommendations.*

2. Section 300.617(a) should be amended to insert "does not exceed actual cost and" after the phrase "if the fee". See Title 14 Del.C. §3130(b). The "authority" reference at the end of this section should also include "Title 14 Del.C. §3130". *The DOE has revised proposed 927.17.0 to incorporate the Committee's recommendations.*

3. Subsection 300.622(c) merits review. First, although it does not appear in 34 C.F.R. §300.62(c) it is not earmarked as a State supplement. Second, the DOE may wish to consider whether the title should not be in bold print. Third, the reference to "LEA" is too narrow since the confidentiality regulations apply to "participating agencies" as defined in §300.61(c). See, e.g., references to "participating agencies" in §§300.613(a), 300.614, 300.616, 300.617, 300.618, 300.622, and 300.623. *The DOE has italicized proposed 927.22.5 to indicate it is a State requirement, not a federal one. The formatting requirements for the State's Administrative Code prevent the DOE from bolding the title of the section at this time; however, the DOE plans to reproduce the revised regulations in a new administrative manual (along with other supporting materials), and welcomes additional feedback about the manual's formatting, typesetting, contents, etc. The DOE has also revised 927.22.5 to add an appropriate references to "participating agency." Please also note that the DOE has further revised 927.22.5 so that it applies to situations in which consent is required; as previously proposed, the section would have required the agency to request a hearing (or not release information) in situations in which 927.22.1 would permit the agency to release PII from educational records under FERPA.*

4. In §300.623(c), the DOE may wish to include a reference to relevant DOE regulations as one of the foci of training. Compare §300.610. *The DOE has revised proposed 927.23.3 to incorporate the Committee's recommendation.*

5. In §300.625, consider adding a reference to Title 14 Del.C. §3101(b) to the "authority" note at the end of the section. *The DOE believes that the Committee may mean to reference Section 3110 of Title 14, and has added that reference to the 927.25.0, as well as too many of the other "authority" notations.*

6. In §300.645, the references to "LEA" are too narrow. The federal regulation, 34 C.F.R. §300.645, refers to "LEAs and other educational institutions". Perhaps the term "public agency" (defined in §300.33) should be used to encompass entities such as charter schools. *The DOE has revised proposed 927.45.1 to incorporate the Committee's recommendation. As an additional note, the proposed definition of "charter schools" in 922.3.0 clarifies the status of charter schools as either LEAs or schools of LEAs.*

7. In §300.646, the reference to "LEA" is too narrow. The federal regulation, 34 C.F.R. §300.646, refers to disproportionality "within the State and the LEAs of the State". Consider substituting "public agency". *The DOE has revised the first reference to "LEA" in proposed 927.46.1 to partly incorporate the Committee's recommendation. The second reference to "LEA" in 927.46.1 and the other references to "LEA" in this balance of 927.46.0 meets the federal regulatory requirements, and the DOE concludes that extending those requirements to other public agencies is unnecessary.*

**SUBPART G - ADMINISTRATION AND USE OF FUNDS**

1. Section 300.700 contemplates an independent DOE audit of district unit counts. "If it is discovered that a child has been erroneously classified" the district's Part B funding is reduced. The underlying assumption behind such an approach is that classification decisions are "black and white" and that the DOE does not make mistakes. In the past, the DOE has adopted restrictive interpretations of eligibility corrected by OSEP. See, e.g., OSEP Policy Letter from J. Schrag to W. Lybarger, 16 IDELR 82 (October 16, 1989). The federal regulations contemplate that a team of professionals "and the parent of the child" determine classification. 34 C.F.R. §§300.306-300.311. There is thus some "tension" between the federal requirement that the district team and parent determine eligibility and the proposed unit count regulation authorizing the DOE to "trump" that decision-making in the context of funding. State statutes [Title 14 Del.C. §§1704 and 1710] envision DOE review of units based on enrollment and calculations, not "second-guessing" whether individual student classifications match the views of a DOE audit team with no familiarity with the students. This is consistent with 34 C.F.R. §300.645. The Committee recommends that proposed §300.700 be amended through deletion of the authorization for the DOE audit team to "trump" the substantive classification decision of individual students. If such authorization is not deleted, the Committee recommends the inclusion of the following paragraph within §300.700(c):

> *Since eligibility and classification are determined by a team of qualified professionals in conjunction with a parent [34 C.F.R. §300.306)], the DOE will defer to that determination in the absence of clear error or major procedural deficiencies in the classification process.*
>
> *The September audit is a long-standing part of Delaware's general supervisory system, and part of its federal plan. Federal regulations do not require the classification of children by disability category at all, so long as each eligible child receives the special education and related services to which they are entitled. See §300.111 (d) (1). Because Delaware's state funding system is classification driven, the DOE believes that is has clear authority to monitor and audit LEAs to assure compliance with State funding requirements and to assure that appropriate documentation is maintained of the student's eligibility. Please note that the DOE has revised 928.1.3 to clarify that all audit functions shall be as provided in the Audit Manual.*

2. In §300.703(b)(1), the statement that "all paraeducators shall work under the supervision of teachers" may be overbroad. It is not required by Title 14 Del.C. §1324. Moreover, the definition of an "instructional paraeducator" [14 DE Admin Code 1500, §2.0] does not literally require paraeducators to work under the direct supervision of a teacher in all contexts. Direct supervision is required in Intensive Learning Centers (ILCs). Title 14 Del.C. §1321(e)(17).

*The DOE has revised 928.3.2 to consistently replace the statutory term "aide" with the term "paraprofessional," and to add a definition of "paraprofessional" that refers to the permitting requirements developed by the Professional Standards Board. The Department believes that the long-standing "supervision" requirement for paraprofessionals is important to maintain the integrity of the special education and related services delivered to children with disabilities. As the Committee notes, there is flexibility in the requirement, since "supervision" does not require "direct" oversight. The DOE's ability to require that paraprofessionals authorized for children with disabilities be supervised by teachers comes from its general regulatory authority over special education in 14 Del.C. §3110. In addition, as the Committee notes in a later comment, 14 Del.C. 1324(a) permits school districts to employ paraprofessionals "subject to the qualifications promulgated by the certifying board." As noted, the Department has aligned the scope of this regulation with the PSB's paraprofessional permit regulation in 14 DE. Admin.Code 1584.2.0, which contemplates the supervision of paraprofessionals. Finally, as the Committee notes, the requirement that pararofessionals in ILCs work under the direct supervision is a statutory requirement and has been reiterated in 928.3.2.3.7*

3. Section 300.703(b)(2)(c) limits payment for autism units to 222 days. It is unclear if the statutory authorization for 1,426 hours of attendance for students with autism [Title 14 Del.C. §1703(e)] equates to paying teachers for more than 222 days. *The DOE has revised proposed 928.3.2.3.3 to account for student programs of more than 222 days, or up to 1,426 hours.*

4. The reference to "attendant" in §300.703(b)(2)(d) is unusual. Only "aides" are mentioned in Title 14 Del.C. §1324. Moreover, §1324 requires the "aides" to meet "qualifications promulgated by the certifying board." The committee is not aware of any certification or permit standards for attendants. *The DOE has deleted the term "or attendant" from revised proposed 928.3.2.3.4 to incorporate the Committee's recommendations.*

5. Aides to support an orthopedic impairment unit or a hearing impairment unit are limited to an "approved special school" by §300.703(b)(2)(d)(e). All other subparts authorize aides within "programs". Title 14 Del.C. §1324 makes no distinction and authorizes aides for "classes" without limiting to special schools or programs. Obviously, the limitation would have an adverse effect on LRE. *The DOE has revised proposed 928.3.2.3.4 and 928.3.2.3.5 to incorporate the Committee's recommendations.*

6. The numbering within §300.703 "24.3" and "24.4" (dealing with nurses and other personnel) appears to have been cut and pasted from another document without being edited for alignment with the rest of this document. Please review for consistency. *The DOE has realigned all numbering, including the subsections noted, consistent with the numbering system required for State regulations.*

7. Literally, §300.703- 24.3.1 limits "employment" of nurses rather than State

funding. Moreover, this regulation does not address the requirement of 1 nurse per facility and partial funding options contained in Title 14 Del.C. §1310 *The DOE has not changed this regulation as it appears in the current AMSES and is not incorporating all of the language regarding funding but is regulating the number of nurses that shall be employed for specific educational classifications.*

8. Section 300.703 - 24.4(d) is not clear. Sterck eligibility for speech pathology and psychology is addressed in Title 14 Del.C. §1331 based on units. The regulation uses passive voice and contemplates that funding will be limited to paying for contractual personnel rather than employment of persons to provide psychology and speech/language pathology services. *The DOE has deleted this subsection as suggested by the Committee.*

9. At the end of §300.703, the DOE may wish to insert an "Authority" note similar to that appearing at the end of §300.700. *The DOE has revised proposed 928.3.0 to insert an authority note as suggested by the Committee.*

**SUBPART I - SPECIAL PROGRAMS AND UNIQUE EDUCATIONAL ALTERNATIVES**

1. In the title and text of §300.900, hyphenate "deafblind" to read "deaf-blind". Compare Title 14 Del.C. §§1321(e)(15) and 1703(e)(m). *The DOE agrees, and has revised proposed 929.1.0 to incorporate the Committee's recommendation. In addition, please note that the requirement for a program management committee in the informal draft of the proposed regulations has been removed from 929.1.0.*

2. Overall, §300.901 is convoluted and difficult to follow. It would benefit from a comprehensive revision. *The Department agrees that 929.2.0 has not recently been comprehensively reviewed. However, given that the program requirements found in this regulation are comprehensive, specific to Delaware, and not required by federal law, the DOE also believes that comprehensive review and suggested revisions to the regulation should first be completed by interested stakeholders, rather than as part of this more global re-write to align with federal requirements.*

3. In §300.901(b)(4)(a)(I), "Charter Schools" should not be capitalized. Compare §300.001(b)(3)(f). *References to charter schools have been removed from Subpart I, given the definition of "LEA" proposed in 922.3.0.*

4. In §300.901(d)(2), one could infer that a revision of bylaws requires a unanimous vote. Consider inserting the word "majority" between "by" and "vote". *The DOE agrees, and has revised proposed 929.2.4.2 to incorporate the Committee's recommendation*

5. In §300.901(e)(2), consider whether a representative of a charter school should be excluded from serving on the Peer Review Committee (PRC). The regulation excludes all other representatives of State agencies and public schools. Charter

schools are considered public agencies in other sections. See, e.g., §300.901(b)(4)(ii). *The proposed definition of "charter schools" in 922.3.0 clarifies the status of charter schools as either LEAs or schools of LEAs.*

6. In §300.901(e)(2), "in-State" should be hyphenated in the last sentence. " *The DOE agrees, and has revised proposed 929.2.5.2 to incorporate the Committee's recommendation*

7. In §300.901(e)(4)(d), consider substituting "student(s)" for "child" or "children". *The DOE has added the term "children with disabilities" in 929.2.5.1.4.5, consistent with federal usage and the definitions in Subpart A.*

8. In §300.901(f)(4), substitute "proposes" for "proposed". *The DOE agrees, and has revised proposed 929.2.6.4.1 to incorporate the Committee's recommendation.*

9. In §300.901(f)(4)(d)(ii), hyphenate "twenty-four". *The DOE has substituted the numeral "24" in proposed 929.2.6.4.4.2 to incorporate the spirit of the Committee's recommendation.*

10. The GACEC has historically supported the licensing of Delaware Autism Program (DAP) group homes by the Division of Services for Children, Youth and their Families (DSCY&F) and the Department of Health and Social Services (DHSS). Section 300.901 does not contemplate such licensure. See, e.g., §300.901(g) (6). It is somewhat anomalous that the regulation requires group homes operated by private providers to comply with DSCY&F peer review and HRC standards. The regulations could be improved by requiring both private and public group homes serving students with autism to be licensed by the DSCY&F (children) or DHSS (adults). *As noted in the response to Comment 2 of this Subpart, the DOE believes that the change recommended by the Committee is better considered as part of a comprehensive review of this regulation by interested stakeholders, so that the authority of various agencies to license DAP group homes can be carefully considered.*

11. Section 300.902(b) appears to make Interagency Collaborative Team (ICT) review dependent upon the annual Appropriations Act. ICT review is not dependent on the Act. It is required by statute. See Title 14 Del.C. §3124(b)(5)(6). *The DOE agrees, and has deleted the introductory clause of proposed 929.3.2 to incorporate the Committee's recommendation.*

12. Section 300.902(f)(1)(a) contemplates the DOE paying 70% of Unique Educational costs and the district paying 30% of such costs. This is ostensibly inaccurate. Title 14 Del.C. §3124(e) cross references Title 14 Del.C. §60(c) as the reference point for the district's share. That statute only envisions districts paying 30% of tuition as defined in §3124. Tuition is defined in §3124(d)(3) as limited to payment for instructional services, materials, and supplies. Tuition would not include school health services, transportation, and maintenance.

Therefore, §300.902(f)(1)(a) overstates a district's liability *The DOE believes the statute give the ICT the authority and discretion to require districts to share costs of all unique educational alternative as the ICT deems appropriate which could include more than tuition for private placement.*

13. Section 300.902(f)(2)(a) is likewise overbroad. Consistent with Title 14 Del.C. §604©), districts are only responsible for 30% of tuition, not 30% of all costs. *DOE believes the ICT has the authority and discretion to require districts to share costs of all unique educational alternatives.*

14. Section 300.902(g)(1) requires public agencies and districts using non-DOE and even non-IDEA funds to only place students in programs "certified" by "the host state". There is no definition of "certification". It is unclear if this is intended to mean certification as an "accredited school". Parents are not subject to DOE "approved list" or "certification" standards. Florence County School District v. Carter, 114 S.Ct. 361 (1993); OSEP Memorandum 94-14, 20 IDELR 1180 (January 21, 1994). If a public agency uses its own funds for an out-of-state placement, query whether the DOE can authoritatively require "host state certification"? *The DOE agrees that the reference to "host" state and "certification" were unclear and have revised 929.3.7.1 to address the ambiguity. The DOE believes that this regulation is critical to both the education and the health and safety of children independently placed by other public agencies and that the DOE's broad statutory authority over the education of children with disabilities permits it to promulgate the regulation. In addition, the proposed state regulation is consistent with and helps implement federal regulation 34 CFR 300.2(c) (proposed State regulation 922.2.2.5, Subpart A).*

**DISCIPLINE PROCEDURES**

1. Section 300.530 would benefit from consistent use of "public agency", defined in 34 C.F.R. §300.33 as including LEAs and charter schools. The underlying federal regulation is "weak" in this context. For example, §300.530(d)(3) and cross referenced §300.536 refer to "public agencies" while §300.530(e)(f)(g) only refer to "LEAs". Moreover, the DOE-authored §300.530(h) "muddies the waters" further by referring to "LEA or other public agency" in Par. (I) [despite definition of "public agency" as including LEAs] and then only referring to "the LEA" in Par. (ii).

   *The DOE agrees there is inconsistent use of the terms public agency and LEA in the federal regulation. The DOE has changed §300.530(h) to "the LEA" and has excluded the term public agency. Where public agency is used in federal regulation, DOE has clarified that the reference is to the LEA.*

2. Section 300.530(h)(i) Notification. "The" should be capitalized at the beginning of the sentence. *The Department has made the correction.*

3. Section 300.530(h)(i) Notification. The Committee recommends that written

notice rules and regulations should be prominently highlighted and parental receipt affirmatively documented.
*The formatting requirements for the State's Administrative Code prevent the DOE from bolding a particular section at this time; however, the DOE plans to reproduce the revised regulations in a new administrative manual (along with other supporting materials), and welcomes additional feedback about the manual's formatting, typesetting, contents, etc. Although affirmative documentation of parent receipt may offer some protection to the LEA, it does not necessarily ensure parent has read and understood the rules and regulation and is an additional paperwork burden and will not be incorporated.*

4. Consistent with the analysis in the preceding paragraph, the DOE should consider the best approach to ensuring that charter schools are appropriately covered by the regulations. Many of the regulations refer to LEAs and the vast majority of charter schools are chartered by the DOE and not an LEA. Perhaps the definition of LEA in the AMSES should explicitly recite that the term covers charter schools. The definition could also address the DSCY&F (which, we believe, acts as an LEA at Ferris) and the prison program. Alternatively, more liberal use of "public agency" should be employed throughout the regulations.

*The Department has defined charter schools as either LEAs or school of an LEA.*

5. In Section 300.532(b), consider inserting "and Title 14 Del.C. Ch. 31" after the term "300.514". This would clarify that the State procedures apply (including authority to issue subpoenas) subject to the exceptions in paragraph (b)(2) through (4) of the section. Otherwise, an LEA could argue that the regulations establish an entirely different hearing system than ordinarily provided under State law. *The Department has inserted the reference suggested by the Committee in 926.32.3.1.*

6. Section 300.532(b)(2)(iii) is not properly "numbered". It really should be §300.532(b)(3). Compare the corresponding federal regulation. Note that this amendment will result in the need to renumber existing Pars. (3) through (6). It will also necessitate amending the reference to "(b)(2) through (4) of this section" in §300.532(b)(1).

7. Section 300.534(d)(2)(ii) is not entirely accurate under State law. Title 14 Del.C. §1604 has been interpreted as an entitlement program for qualifying students. In contrast, proposed §300.534(d)(2)(ii) affirmatively authorizes suspension or expulsion of unidentified students "without educational services". Even though the evaluation is to be undertaken on "an expedited basis", this is a subjective standard and there is no objective time limit. The Committee recommends simply deleting "which can include suspension or expulsion without educational services". Section 300.534(d) already recites that "the child may be subjected to disciplinary measures applied to children without disabilities who engage in comparable behaviors". This is a more accurate standard. *The DOE has retained the federal language in this part.*

8. In §300.534(d)(iii), the DOE may wish to substitute “these regulations” for “this part”. This is the approach adopted to references to “this part” in §§300.202(b)(ii) and 300.209(c)(d). *All references to “this part” have been converted to “these regulations” as suggested by the Committee. In addition, a definition of “these regulations” has been added to Subpart A.*

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